***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

DLB-McG-R
9-24-68
(1)

# BRIEF FOR APPELLANT

---

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Nos. 21,330 & 21,941

184

EUGENE F. ALEXANDER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

---



WILLIAM W. GREENHALGH
FOY R. DEVINE
424 Fifth Street, N. W.
Washington, D. C. 20001

Counsel for Appellant
(Appointed by this Court)

June 17, 1968

## QUESTIONS PRESENTED

I. Whether appellant should be granted a new trial on the ground of newly discovered evidence.

II. Whether the trial court should have conducted a hearing to determine if there had been a conscious failure on the part of original trial counsel to call medical and certain lay witnesses who were known, available and able to give material testimony.

# I N D E X

## TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,330 & 21,941

EUGENE F. ALEXANDER,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR APPELLANT

## JURISDICTIONAL STATEMENT

Appellant was indicted and convicted in the U.S. District Court for the District of Columbia of threatening the life of the President of the United States in violation of 18 U.S. Code, Section 871. This Court has jurisdiction upon appeal to review the judgments of the District Court under 28 U.S. Code, Section 1291.

## STATEMENT OF THE CASE

The appellant, Eugene F. Alexander, was indicted on August 15, 1966 on two counts of threatening the life of the President of the United States in violation of 18 U.S.Code, Section 871. On February 8, 1967 the case came on for trial before the Honorable Oliver Gasch, United States District Judge. After being found guilty on both counts, Mr. Alexander was sentenced under 18 U.S. Code, Section 4208(a)(2) to an indeterminate period not to exceed three years. On August 22, 1967 Judge Gasch authorized Mr. Alexander to proceed on appeal without prepayment of costs.

On January 30, 1968 Mr. Alexander filed a Motion for a New Trial upon the grounds of newly discovered evidence and conscious failure by original trial counsel to call expert medical testimony. On February 15, 1968 Judge Gasch denied appellant's motion. Mr. Alexander petitioned Judge Gasch to reconsider the motion for a new trial and attached affidavits, but this petition was denied on April 22, 1968. The denial of this petition was also appealed, and on May 29, 1968 this Court granted leave to consolidate the two matters for briefing and oral argument.

At trial the evidence was uncontroverted that between 7:35 p.m. (Tr. 34) and 8:50 p.m. (Tr. 58) on Saturday, July 23, 1966 Mr. Alexander made several telephone calls to the White House. During the course of those calls, he made oral

threats upon the life of the President to two Secret Service Agents. The conversations were taped by the Secret Service, and the tapes were admitted into evidence (Tr. 77).

The only defense raised by original trial counsel was that Mr. Alexander was too drunk at the time of the offense to form the specific intent element of the crime. In support of this defense original trial counsel called the appellant and three other witnesses. Their testimony may be summarized as follows:

(1) Eugene F. Alexander testified that he had been drinking for three days prior to the offense. He also testified that he could not remember making any of the statements which had been recorded by the Secret Service Agents.

(2) Mrs. Dorothy Kibler testified that she had known Mr. Alexander for a couple of years and had seen him drunk quite often. For some time she had kept his infant daughter, and that during Mr. Alexander's visits, she had seen him under the influence of alcohol many times. Furthermore, on the morning of the day the offense occurred (some seven to eight hours earlier), she had refused to permit Mr. Alexander to visit with his daughter because of his drunken condition.

(3) Mr. Forrest Lynn Teel testified that he had known Mr. Alexander for about five or six years and that he personally knew the defendant to be a heavy drinker. He said that about three to four hours before the offense occurred

he saw Mr. Alexander drinking in a bar, and that the appellant appeared to be intoxicated at that time.

(4) Mr. Frank Duncan, Jr. testified that Mr. Alexander had worked for him on and off for five or six years. He also testified that he had seen the appellant drinking on numerous occasions and even had asked him to leave the shop a couple of times because of his drinking. Finally he said that after being paid on Fridays, Mr. Alexander would usually buy a bottle of liquor and bring it to the shop to drink.

During the course of Mr. Alexander's testimony, he mentioned a man named Jimmy who was drinking with him about an hour before the offense occurred. Although he had known Jimmy since Christmas Day of 1958, he did not know his last name. He had "looked all over town" and had been unable to locate him (Tr. 99-101). Since the trial Mr. Alexander has learned that Jimmy's last name is Babb, and that at the time of the trial was serving a sentence in Occoquan, Virginia for being drunk in public. The affidavit of James Babb attached to appellant's Petition for Reconsideration of Defendant's Motion For a New Trial indicates that his testimony would be as follows: (1) that he drank with Mr. Alexander up until about an hour before the offense occurred, (2) that Mr. Alexander passed out about an hour before the offenses occurred, (3) that during one of the calls to the White House, he happened by the phone booth

and physically removed Mr. Alexander from the booth and (4) that on the basis of numerous prior observations of Mr. Alexander and the effect alcohol had upon him, he knew Mr. Alexander was very drunk.

Original trial counsel failed to call an expert medical witness to explain how Mr. Alexander's drinking habits and alcohol consumption prior to the offense would have prevented him from forming the requisite specific intent.

## SUMMARY OF ARGUMENT

The newly available testimony of James Babb is sufficient to require a new trial in the interest of justice. This newly discovered evidence meets all five criteria normally required for a new trial. The evidence has become available since the trial, and Mr. Alexander showed diligence in his attempt to locate James Babb before his trial. The testimony is material to the issue of whether Mr. Alexander could have formed the requisite specific intent, and in a new trial it would probably produce an acquittal. Lastly, the evidence is not merely cumulative, because it describes Mr. Alexander's intoxicated condition at the time the offense occurred through the eyes of a disinterested witness who nevertheless was familiar with appellant's demeanor while under the influence of alcohol. Even if the testimony of Jimmy Babb were considered merely cumulative, the requirement should not be applied where a disinterested witness becomes available to supply vital evidence and the only similar evidence at the trial was that of the defendant himself.

In addition to the testimony of Jimmy Babb, appellant has another reason why the interests of justice require a new trial. Original trial counsel failed to call lay and expert medical witnesses to establish that Mr. Alexander had a history of "blank periods" and that he was probably suffering

from this condition at the time he telephoned the White House At the very least, the trial court should have conducted a hearing to determine whether the original trial counsel had consciously failed to call these witnesses.

## ARGUMENT

Rule 33 of the Federal Rules of Criminal Procedure states in part that "the Court on motion of a defendant may grant a new trial to him if required in the interest of justice...." The language of the rule and cases which have interpreted the Rule clearly leave the granting of a new trial to the sound discretion of the trial judge. See, e.g., Smith v. United States, 124 U.S. App. D.C. 57, 361 F.2d 74 (1966). In the case at bar, the interest of justice requires that Mr. Alexander be provided the opportunity in a new trial to introduce the testimony of Jimmy Babb and to show that he was in a "blank period" at the time he called the White House.

### I. APPELLANT SHOULD HAVE BEEN GRANTED A NEW TRIAL ON THE GROUNDS OF NEWLY DISCOVERED EVIDENCE

In Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951), this Court set out guidelines for granting new trials on the basis of newly discovered evidence. Since Rule 33 provides only the general test — "in the interest of justice,"— this Court set out five conditions which must be met:

(1) the evidence must have been discovered since the trial,

(2) the party seeking the new trial must show diligence

in an attempt to procure the newly discovered evidence,

(3) the evidence relied on must not be merely cumulative or impeaching,

(4) the evidence must be material to the issues involved, and

(5) the evidence must be of such nature that in a new trial it would probably produce an acquittal.

The newly discovered testimony of Jimmy Babb meets all of the requirements set out in the Thompson case.

A. Discovered Since Trial.

It is sufficient if the defendant, though he was aware of the evidence, was unable to have the witness present for trial. If the defendant discovers the witness' whereabouts or is able to obtain his presence for the first time after the trial, then this condition is satisfied. See, Amos v. United States, 95 U.S. App. D.C. 31, 218 F.2d 44 (1954).

In this case appellant testified at trial that he did not know Jimmy's last name at that time, but that he had looked all over town for him and had been unsuccessful (Tr. 100-101). This situation is very similar to that in Amos, supra, where the defendant had not known the proper spelling of the witness' last name, and thus had gotten no return on his subpoena of the witness. In both cases the defendants knew of the existence of the evidence but were unable to

locate the witnesees until after the trial. In Amos, supra, there was apparently a fulfillment of this condition, because a new trial was granted.

B. Diligence.

In Amos v. United States, supra, there was a sufficient showing of diligence in the fact that the defendant sent a subpoena to the D.C. Workhouse at Occoquan, Virginia. Apparently the witness was at Occoquan, but prison authorities failed to produce him, because the mispelled name ("Bordoe" instead of "Bordeaux") led them to believe that he was not in their custody.

In this case, the appellant employed far greater diligence than was shown in Amos. No subpoena could be issued, because appellant did not know Jimmy's last name or his whereabouts. As the record reflects, the defendant had a hunch that Jimmy might be in jail (Tr. 101), but he was unable to check out his hunch without knowing Jimmy's last name. Therefore, all appellant could do was look in all the places where Jimmy was known to frequent. He testified that he did look all over town and could not find him. Appellant submits that this is a sufficient showing of diligence in an attempt to procure the evidence for trial.

C. Not Merely Cumulative or Impeaching.

At first glance, the testimony of Jimmy Babb appears to be merely cumulative, because the appellant

testified about drinking with Jimmy up until about an hour before the first call was made to the White House. However, Jimmy Babb's testimony is important not merely to corroborate the appellant's testimony as to how much he drank between about 5:00 p.m. and 6:30 p.m. on July 23, 1966. It is more important to describe Mr. Alexander's intoxicated condition immediately prior to and at the time of making the phone calls through the eyes of a disinterested witness who nevertheless was familiar with the appellant's demeanor while under the influence of alcohol.

Even if Jimmy Babb's testimony were considered merely cumulative, the appellant should not be precluded from obtaining a new trial. In Amos, supra at 31, Judge Edgerton writing for the Court said,

> We have held that newly discovered evidence which is merely cumulative does not require a new trial. Thompson v. United States, 88 U.S. App. D.C. 235, 188 F.2d 652. But that principle should not be applied where, as here, a disinterested witness becomes available who can supply evidence of vital importance and the only similar evidence at the trial was that of the defendant himself.

In Amos the defendant, who had been convicted of assaulting one Smith with a knife, testified that Smith had threatened him with a knife just before the assault. The newly discovered evidence would be to the effect that Smith did threaten the defendant with a knife just before the defendant cut Smith. Mr. Alexander submits that with respect to the condition that

the evidence must not be merely cumulative the Amos case is indistinguishable from this case. Therefore, the condition should not be invoked against appellant.

D. Materiality.

The only disputed issue of fact at appellant's trial was whether he was too drunk to have been capable of forming the specific intent element of the crime. The testimony of Jimmy Babb is material to that issue, because he observed the condition of the defendant from about 5:00 p.m. to about 6:30 p.m. and then again while defendant was on the phone to the White House. Moreover, Jimmy Babb knows how much Mr. Alexander had to drink from about 5:00 p.m. to about 6:30 p.m. on the evening the offense was committed. His testimony would certainly be material to the issue of how drunk the appellant was when he made threats against the President over the telephone.

E. Productive of an Acquittal.

In the language of the Thompson case, supra at 236, the newly discovered evidence must be "of such nature that in a new trial it would probably produce an acquittal." It need not swing the evidence in favor of the defendant to such an extent that a motion for judgment of acquittal should be granted. The purpose of this condition is to save the time and expense of having a new trial unless there is a

reasonable prospect that the result will be different. Appellant submits that the testimony of Jimmy Babb is likely to produce an acquittal of appellant if appellant is granted a new trial. He will be able to give disinterested testimony as to Mr. Alexander's state of inebriation at about 5:00 p.m. on the evening of the offense. He will be able to testify as to how much Mr. Alexander drank from about 5:00 p.m. to about 6:30 p.m. He will be able to describe Mr. Alexander's condition when he pulled appellant out of the phone booth sometime after 7:30 p.m. on July 23, 1966.

## II. THE TRIAL COURT SHOULD HAVE CONDUCTED A HEARING TO DETERMINE WHETHER THERE WAS A CONSCIOUS FAILURE ON THE PART OF ORIGINAL TRIAL COUNSEL TO BRING OUT APPELLANT'S CONDITION OF SUFFERING FROM "BLANK PERIODS."

Appellant's sole defense at trial was that because of his intoxicated condition he was unable to form, and did not form, the specific intent to knowingly and willfully make threats upon the life of the President. Because of his intoxicated condition, Mr. Alexander was unaware of what he was doing. His lack of awareness was similar to that of one who talks in his sleep.

According to the evidence, Mr. Alexander showed none of the normal indicia of extreme intoxication. He was not stumbling and falling on the floor (Tr. 64). He was able to speak in a fairly coherent and understandable manner (Tr. 64).

Obviously he was able to look up and dial the number at the White House. Trial counsel must have realized that these matters would come out at trial and would raise questions in the jurors' minds. Most laymen assume that if a man has had so much to drink that he is not aware of what he is doing, then he must necessarily have corresponding loss of his phusical controls. Therefore, trial counsel should have sought an explanation for this phenomenon. Had he done so, he would have found that there is a logical medical reason for this apparent inconsistency.

Mr. Alexander is an alcoholic, and from sometime in the early 1950's through the date of the offense, July 23, 1966, he consumed large amounts of liquor each day. As a result of this large consumption rate, Mr. Alexander developed a very high tolerance to the effects of alcohol upon his physical controls. This high tolerance made it possible for him to become so intoxicated that he lost an awareness of what he was doing, but would retain substantial control over his physical movements. This phenomenon, known as a "blank period," was characterized by an inability to remember what transpired during the period.

It should be emphasized that appellant did not raise an insanity defense and is not doing so at this time. The report from St. Elizabeths Hospital indicated that Mr. Alexander did not suffer from any mental disease or defect. Although it is

possible that "blank periods" could be caused by a mental disease or defect, those suffered by Mr. Alexander result from his consumption of alcohol.

The failure of trial counsel to seek out and present expert medical testimony cannot be dismissed as merely a tactical decision. Mr. Alexander's condition of suffering from "blank periods" is the central issue in the case. It is not only relevant to the intent element of the offense, but it is in effect determinative of that issue. There was no possible tactical advantage in not calling an expert medical witness to testify. In light of all the facts available to trial counsel, appellant submits that his failure to present medical testimony was probably a conscious decision which can only be explained by trial counsel.

Recent cases in this jurisdiction suggest that if on a motion for a new trial it is shown that the trial counsel consciously failed to call material witnesses who were known and available, then such showing would warrant a new trial. See, Jackson v. United States, 125 U.S. App. D.C. 307, 371 F.2d 960 (1966); Campbell v. United States, #19,411 (decided May 16, 1966). In the Campbell case, this Court remanded for a hearing to determine whether trial counsel had consciously failed to call a material witness who was known and available. In this case, the trial judge held no hearing on appellant's motion for a new trial or on the question of conscious failure of trial counsel to call medical testimony. Appellant

submits that at the very least he should have been given a hearing on this matter.

## CONCLUSION

Mr. Eugene Alexander urges this Court to grant him a new trial in the interest of justice. The testimony of Jimmy Babb is sufficient in itself to warrant a new trial. Moreover, there is a substantial possibility that Mr. Alexander's trial counsel consciously failed to present material and available testimony of a medical expert. Wherefore, appellant respectfully prays that the judgments below be reversed and the case remanded for a new trial. In the alternative, appellant prays that the case be remanded for a hearing on the question of whether trial counsel consciously failed to call expert medical testimony.

Respectfully submitted,

William W. Greenhalgh

WILLIAM W. GREENHALGH

Foy R. Devine

FOY R. DEVINE
424 Fifth Street, N. W.
Washington, D. C.

Counsel for Appellant
(Appointed by this Court)

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief has been personally served at the Office of the United States Attorney, United States District Courthouse, Washington, D. C. this 17th day of June, 1968.

Foy R. Devine

FOY R. DEVINE

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 21,230 and 21,941

---

EUGENE F. ALEXANDER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court
for the District of Columbia

---


DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
*Assistant United States Attorney.*

CHARLES E. BROOKHART,
*Attorney,*
*Department of Justice,*
*Washington, D. C. 20530.*
*Attorneys for Appellee.*

## ISSUES PRESENTED

In the opinion of the appellee, the questions presented by this case are:

1. Whether the trial court abused its discretion in denying appellant's motion for a new trial, based on a claim of newly discovered evidence.

2. Whether a remand or a new trial is warranted, based on a claim that original trial counsel consciously failed to call a material witness.

# INDEX



## TABLE OF CASES



## OTHER REFERENCES



---

* Cases chiefly relied upon are marked by asterisks.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Nos. 21,330 and 21,941

---

EUGENE F. ALEXANDER, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

---

**Appeal from the United States District Court for the District of Columbia**

---

## BRIEF FOR APPELLEE

---

## COUNTERSTATEMENT OF THE CASE

On August 15, 1966, the appellant, Eugene F. Alexander, was charged in a two-count indictment with threatening the life of the President of the United States of America in violation of 18 U.S.C. § 871. The case came before the Honorable Oliver Gasch, United States District Court Judge, on February 8, 1967. Having been found guilty by a jury on both counts, Mr. Alexander was sentenced under 18 U.S.C. § 4208(a)(2) to an indeterminate period not to exceed three years. On August 22, 1967, Judge Gasch authorized Mr. Alexander to proceed on appeal without prepayment of costs.

On January 30, 1967, appellant filed a motion for a new trial upon the grounds of newly discovered evidence and conscious failure by original trial counsel to call expert medical testimony. Judge Gasch denied appellant's motion on February 15, 1968. Appellant petitioned Judge Gasch to reconsider the motion for a new trial and attached affidavits; petition was denied on April 22, 1968. The denial of this petition was also appealed, and, on May 29, 1968, this Court granted leave to consolidate the two matters for briefing and oral argument.

The pertinent facts may be summarized as follows:

On Saturday, July 23, 1966 between 7:35 P.M. (Tr. 34) and 8:50 P.M. (Tr. 58), from a public telephone located in an apartment building lobby at 1742 P Street, N. W., Washington, D. C. (Tr. 59), appellant, Eugene F. Alexander, made five telephone calls lasting a total of 50 minutes (Tr. 49). Each call was made to the White House in Washington. During the course of those calls, appellant repeatedly (Tr. 47) made oral threats upon the life of the President to two Secret Service Agents [Government exhibit 1 (tape recording)] The conversations were recorded by the Secret Service, and the recordings were admitted into evidence (Tr. 77) and played for the jury (Tr. 78). The two Secret Service Agents also testified as to the context of the threats. Special Agent Clark D. Fisher testified that he heard appellant say "If I had a gun I'd blow President Johnson's brains out" (Tr. 34). Special Agent Charles B. Baber testified that during one of the calls, "the caller made approximately six statements of a threatening nature concerning President Johnson" (Tr. 47). Agent Baber further testified that the caller "also stated that he meant to do this thing, referring to killing the President, and he has made up his mind to do it, that he plans to do it, that if he could get a gun that he would do it, and several times during the call he made that same statement, that 'if I had a gun I would blow President Johnson's brains out'" (Tr. 48).

The appellant was arrested by two Secret Service Agents while in the phone booth (Tr. 60, 68). At the

time he was arrested, the appellant was still conversing with the Agents at the White House (Tr. 60, 68). As appellant was taken from the phone booth he dropped the telephone. Special Agent Mitchell picked it up and ascertained that Agent Baber was on the other end of the line (Tr. 68).

The four Special Agents testified that appellant could be clearly understood; his speech was very coherent and he sounded like he knew what he was talking about (Tr. 43, 56, 64, 65, 71). When asked if he had been drinking, appellant said, "no, I am not drinking (Tr. 35, 55). Mr. Alexander told the agents that he had been drinking orange drink (Tr. 55). The agents did not believe appellant was drunk or intoxicated (Tr. 56, 63, 71); his face was not red and he did not stagger; he did not appear abnormal when he was picked up (Tr. 63, 64, 71), although two agents could detect a medium to light odor of alcohol about him (Tr. 63, 70).

The main defense raised at trial was that Mr. Alexander was too drunk at the time of the offense to form the specific intent which is an essential element of the crime. In support of this defense, original trial counsel called the appellant and several other witnesses.

Appellant testified that at 10:00 a.m. on Saturday, July 23, 1966 he went to the whiskey store (Tr. 98) where, "I bought a pint of Rocking Chair whiskey and I bought six bottles of ten-cent beer, the small ones" (Tr. 98). He then "went home and came in the back door" (Tr. 98). He then went to visit his child, but Mrs. Dorothy Kibler, the woman looking after his baby, would not permit him in because he was intoxicated. Mrs. Dorothey Kibler testified that she had seen appellant drunk quite often in the past few years (Tr. 80). She stated that on the morning of the day of the offense (some seven to eight hours earlier), she had refused to permit appellant to visit with his daughter because of his drunken condition (Tr. 90). Mrs. Kibler testified that Mr. Alexander "didn't talk very plain" (Tr. 89); that, when he left, he "stumbled on out" (Tr. 90).

Mr. Alexander testified that he next went to "the Speakeasey on 14th and L," where he "only drank beer" (Tr. 99). He then "came walking on back up by Thomas Circle, stopped in the Alamo, and had a beer there" (Tr. 113). He then met James Babb, who accompanied him to his apartment. Mr. Alexander testified that "before I got home, I made a left on 17th Street. We were walking down P Street and went to the whiskey store and I knew the man wasn't going to serve me so I sent him in to get me three half pints of Rocking Chair whiskey and ten bottles of this small beer. I recall that distinctly. It was around 4:00 in the evening" (Tr. 99, 100). After drinking these intoxicants with Jimmy, Mr. Alexander testified that he remembered "calling the White House" (Tr. 101). He claimed that he wished to talk to a Mr. David B. Davis (Tr. 101) at the White House, a man whom Mr. Alexander believed to be a security guard. Appellant testified that "I got to talking to somebody who said something about Mr. Johnson and I thought I said the hell with Mr. Johnson and that was it." Mr. Alexander stated that he remembers nothing of the telephone conversations which then took place. (Tr. 103). When asked if he were intoxicated when he made these calls, appellant testified that "I was drunk" (Tr. 103). He also testified that he did not intend to threaten the life of the President, and that he did not know what he was saying when he made the calls (Tr. 103).

Mr. Forrest Lynn Teel testified that he had known Mr. Alexander for about five or six years, and that he personally knew the defendant to be a heavy drinker (Tr. 135). He testified that when appellant would show himself in an intoxicated state, he would make "crazy" irrational statements (Tr. 136) and that he did not appear to be the same person that he was when he was sober (Tr. 137). Mr. Teel stated that Mr. Alexander did not know what he was talking about when he was intoxicated; that he would say things over and over; that he did not, in fact, talk about anything at all (Tr. 136). Mr. Teel testified that on the afternoon of the offense, he saw ap-

pellant in the Speakeasy bar in an intoxicated condition at, "about 3:00 or 4:00 P.M." (Tr. 137). Mr. Teel stated that appellant "halfway understood" what he (Mr. Teel) said when he spoke to him (Tr. 138). Mr. Teel then left the appellant in the bar (Tr. 138). This was three to four hours before the offense occurred.

Mr. Frank Duncan, the appellant's employer, testified that he had known the appellant for five or six years (Tr. 151). He testified that he had spoken with the appellant during the course of his (the appellant's) heavy drinking. Mr. Duncan stated that at these times the appellant was not coherent and did not know what he was talking about (Tr. 152).

During the course of Mr. Alexander's testimony, he mentioned a man named Jimmy who was drinking with him about an hour before the offense occurred (Tr. 99). Mr. Alexander claims that he did not know Jimmy's last name; that since the trial he has learned that Jimmy's last name is Babb, and that, at the time of the trial, he was serving a sentence at Occoquan, Virginia. The affidavit of James Babb, attached to appellant's Petition for Reconsideration of Defendant's Motion for a New Trial, indicates that his testimony would be as follows: (1) that he knew by the way Mr. Alexander was acting that he was in an advance state of intoxication, (2) that they drank together up to about one hour before the offense, (3) that he only heard part of one conversation, (4) that he pulled the phone away from Mr. Alexander on that one occasion, (5) that he knew Mr. Alexander was very drunk because of the way he acted and what he said (6) and that he left appellant at his apartment shortly after he had pulled the phone from appellant's hand.

In support of his Petition for Reconsideration of the Motion for New Trial the appellant filed an affidavit by John W. Devine, Jr., M.D. According to this affidavit, the doctor had examined the appellant at some unspecified time and would testify that: (1) appellant is an alcoholic, (2) he has consumed an average of one quart of liquor per day, from about 1953 up to the date of the

offense, (3) Mr. Alexander had a very high physical tolerance to the effects of alcohol on the date of the offense, (4) it is possible for the defendant to drink so much that he would not have an awareness of what he was doing and yet retain almost complete control of his physical faculties; (5) that, in his opinion, appellant did not have an awareness of what he was doing at the time the offense was committed.

## STATUTES AND RULE INVOLVED

18 U.S.C. 871, provides in pertinent part:

> (a) Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shal be fined not more than $1,000 or imprisoned not more than five years, or both.

28 U.S.C. 2255, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

Rule 33, Federal Rules of Criminal Procedure, provides in pertinent part:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . .

## SUMMARY OF ARGUMENT

### I

The testimony of James Babb is insufficient to "require a new trial in the interest of justice," based on a claim of newly discovered evidence. The trial court has broad discretion as to whether a new trial should be granted because of newly discovered evidence; its action should not be disturbed on appeal unless a clear abuse of discretion appears. The affidavits show that the "newly discovered evidence" is totally cumulative, not the sort of evidence which would probably produce an acquittal. Here, because of the recording made by the Secret Service, the jury in a very real sense had the opportunity of listening to the defendant's own words, weighing and evaluating his manner of speech, his formulation of ideas; particularly the words by which his threats against the president were uttered. Additionally, sufficient evidence was presented on both sides of the question of specific intent for the jury to make an intelligent and fair decision.

### II

The testimony of John W. Devine, Jr., M.D., is insufficient to require a remand or a new trial, based on a claim that original trial counsel consciously failed to call a material witness. The reviewing court should refuse to reassess by hindsight the judgment of defense trial counsel on questions of strategy, trial tactics, or trial decisions.

Appellant does not show a conscious failure by trial counsel. Appellant should not be allowed to employ counsel to put on half his case, and later claim a new trial on the grounds of ineffective assistance of counsel. Additionally, the medical testimony is cumulative and would not be productive of an acquittal in a new trial. Finally, if appellant feels he can properly state a claim under section 2255, he should pursue that course.

## ARGUMENT

### I. The Trial Court did not Abuse its Discretion in Denying Appellant's Motion for a New Trial, Based on a Claim of Newly Discovered Evidence.

(Tr. 24, 35, 43, 55, 56, 63-65, 70, 71, 83, 89, 90, 103, 137, 138)

Under Rule 33, Federal Rules of Criminal Procedure, and the cases which interpret it, the granting of a new trial is left to the sound discretion of the trial judge. See, e.g., *Thompson* v. *United States*, 88 U.S. App. D.C. 235, 188 F. 2d 652 (1951). Here, there has been no showing by the appellant that the trial judge abused his discretion in denying the Motion for New Trial.

In *Thompson* v. *United States*, *supra*, this Court set out specific guidelines for granting new trials on the basis of newly discovered evidence. Since Rule 33 provides only the general test—"in the interest of justice," —this Court set out several conditions which must be met before a new trial will be granted. Among these conditions are the requirements that the newly discovered evidence not be cumulative and that it be of such a nature that a new trial would probably produce an acquittal. In the case at bar, the alleged newly discovered evidence is clearly cumulative. Also, it is not of such a nature that, in a new trial, it would probably produce an acquittal. Thus, it fails to meet the requirements set forth in *Thompson*.

### A. *Merely Cumulative or Impeaching*

Mr. Babb's affidavit indicates that he would testify that he was with appellant up until about one hour before the time of the offense and for a brief time while one of the calls was being made. He would further testify that he knew by the way appellant was acting and what he said that appellant was in an advanced state of intoxication. The ultimate issue at trial was not whether appellant had been drinking, but rather, whether or not he was capable of forming, and did form, the necessary intent (Tr. 24). The statute under which appellant was convicted, 18 U.S.C. § 871, carries the requirement that the threat be knowingly and willfully made. The Court, in *Ragansky* v. *United States*, 253 Fed. 643 (7th Cir. 1918), said:

> A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him. . . .
>
> And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.

[See also, *Pierce* v. *United States*, 365 F. 2d 292 (10th Cir. 1966).]

Clearly, the questions for the jury was one of intent, not intoxication alone. Nowhere in his affidavit does Mr. Babb indicate that he will give testimony that would add anything to that which was given by other witnesses. His testimony would be merely cumulative.

At trial, appellant's witness Mr. Dorothy Kibler testified that she had refused to permit appellant to visit with his daughter because of his drunken condition on the morning of the day of the offense (some seven to eight hours earlier) (Tr. 90). She said Mr. Alexander "didn't talk very plain" (Tr. 89) and that when he left, he "stumbled on out" (Tr. 90). Mr. Teel, another of appellant's own witnesses, testified that on the afternoon of the offense, he saw appellant in the Speakeasy bar in an

intoxicated condition, at "about 3:00 or 4:00 P.M." (Tr. 137). Two of the Secret Service agents who arrested Mr. Alexander testified that they could detect a medium to light odor of alcohol about him (Tr. 63, 70). They were present both during and after one of the calls. Thus, they were present at the time of the offense. The appellant also testified that he was drunk at the time he made the calls (Tr. 103). Clearly then, the "new" testimony that Mr. Baab offers would only repeat that which was presented to the jury by other witnesses. *Thompson* v. *United States, supra.*

In his brief to this Court the appellant relies heavily on *Amos* v. *United States*, 95 U.S. App. D.C. 31, 218 F. 2d 44 (1954). The case at bar may be distinguished from *Amos*. In *Amos* this Court said:

> The defendant cut the complaining witness Smith. The motion for a new trial was supported, among other things, by an affidavit of one Bordeaux, who was not a witness at the trial, that just before the cutting Smith had threatened the defendant with a knife. *At the trial there was no testimony, except that of the defendant himself, to this effect.* [Emphasis added]

Unlike *Amos*, in the case at bar there were pages of testimony by several witnesses, both prosecution and defense, on the issue to which Mr. Babb's "new evidence" is addressed. Four Secret Service agents testified to appellant's condition both during and immediately after the offense (Tr. 35, 43, 55, 56, 63, 65, 70, 71). Mr. Forrest Lynn Teel, appellant's witness, testified (Tr. 137, 138) as to appellant's intoxicated condition three to four hours before the offense occurred. Mrs. Dorothy Kibler, another of appellant's witnesses, testified to the question of appellant's degree of intoxication on the morning of the offense (Tr. 83, 90). Unlike *Amos*, this is not a case where "the only similar evidence at the trial was that of the defendant himself." *Amos* v. *United States, supra* at 31.

Additionally, *Amos* requires that the newly discovered evidence be of "vital importance." Appellee submits that the ultimate issue here is specific intent rather than intoxication. In light of the testimony received at trial on the actual issue of specific intent and the appellant's drinking habits as affecting this issue (Tr. 43, 56, 64, 65, 71, 89, 103), the Babb testimony would merely be cumulative. Because a fifty minute recording of appellant's own words was available, the proffered new testimony, heard by one who only heard part of one of five telephone conversations, hardly semes to be of "vital importance." The Trial Judge, in his order denying the Motion for a New Trial, recognized that appellant's defense was adequately presented to the jury. In its order, the court stated:

> The evidence on the basis of which defendant seeks a new trial is cumulative in character. The defendant asserted this defense of intoxication at trial, and at that time called a number of witnesses who testified as to his condition. It is also noted that the jury had the benefit of hearing a recording of his conversation by the Secret Service from the other end of the line. Thus, the jury in a very real sense had the opportunity of listening to the defendant's own words, and weighing and evaluating his manner of speech, his formulation of ideas, particularly the words by which his threats against the life of the President were uttered. The Court's charge (Tr. pp. 198-199) fully covered the jury's function with respect to this evidence.[1]

Clearly there was sufficient evidence presented by other witnesses on the issues. Mr. Babb's testimony would add nothing new—it is merely cumulative.

---

[1] The court in its order noted that since the case was on appeal that it had lost jurisdiction over it. In spite of this procedural technicality the Court saw fit to rule on the merits of the motion.

### B. *Not Productive of An Acquittal*

In the language of *Thompson* v. *United States*, *supra*, at 236, the newly discovered evidence must be "of such nature that in a new trial it would probably produce an acquittal." The purpose of this condition is to save the time and expense of having a new trial unless there is a reasonable prospect that the result will be different. Appellee submits that the testimony of James Babb is not of such nature that in a new trial it would probably produce an acquittal. The fact that Mr. Babb overheard part of one telephone call, and could testify to what appellant said and his condition at that time, would do little to produce an acquittal. The original trial jury found appellant guilty when it heard a fifty minute recording containing conversations from all five of the telephone calls, and had heard ample testimony from both government and defense witnesses as to the appellant's condition on the date of the offense.

## II. A New Trial or a Remand is Not Warranted by Appellant's Claim that Original Trial Counsel Consciously Failed to Call a Material Witness.

(Tr. 80, 82, 83, 89, 90, 98-100, 103, 135-138, 152)

Appellant's trial counsel thoroughly explored the defense of lack of specific intent. This court should refuse to reassess by hindsight the judgment of defense counsel on questions of strategy, trial tactics, or trial decisions.

The affidavit of John W. Devine, Jr., M.D. is insufficient to require a new trial. The affidavit indicates that Dr. Devine would testify to matters which were fully explored by trial counsel. The affidavit indicates that Dr. Devine would testify that appellant is an alcoholic who has consumed an average of one quart of liquor per day since about 1953; that appellant had a very high physical tolerance to the effects of alcohol at the time of the offense; that it was possible for appellant to drink so much that he would not have had an awareness of what he was doing, and yet retain almost complete control of his physi-

cal faculties; that, in his opinion, the appellant did not have an awareness of what he was doing at the time the offense was committed.

There was sufficient testimony presented at trial for the jury to have made an informed and just decision concerning these questions. Appellant's witness Dorothy Kibler testified that appellant had a drinking problem and was an alcoholic (Tr. 80, 82, 83). Mr. Teel and Mr. Duncan, both appellant's witnesses, testified that appellant was a heavy drinker (Tr. 135, 152). These three witnesses also testified as to the effect of alcohol upon the physical person of appellant (Tr. 83, 89, 90, 136, 138, 152). The appellant testified as to the quantity of intoxicants he had drunk (Tr. 98-100). Mrs. Kibler and Mr. Teel testified that the appellant was drunk on the day the offense was committed. (Tr. 90, 137). Both Mr. Teel and Mr. Duncan testified that appellant didn't know what he was doing when under the influence of alcohol (Tr. 136, 152). The appellant testified that he didn't remember anything of the telephone conversations in question (Tr. 103). There is nothing contained in Dr. Devine's affidavit which was not testified to in one form or another by one of appellant's defense witnesses. Appellee submits, therefore, that the testimony of Dr. Devine would, in fact, be merely cumulative. The reason why original defense counsel did not choose to call a doctor to adduce expert medical testimony is not the issue. What matters is that he did get the same evidence before the jury through the mouths of lay witnesses. His strategy in using lay witnesses rather than a medical witness should not be questioned here. Defense counsel's summation to the jury well indicates that his thorough and extensive inquiry into appellant's past habits and appellant's condition at the time of the offense permitted a vigorous and effective argument to the jury on the issue of intent and appellant's capacity to formulate such an intent (Tr. 185-186). Appellant's only complaint can now be that the jury on the basis of all the evidence presented at trial, including its reception of appellant's own statements, chose to reject this defense.

Certainly the trial court did not abuse its discretion in refusing to conduct the hearing requested by appellant.

The question of whether or not there was a conscious failure on the part of original trial counsel to call material witnesses was first raised on a motion for new trial. Appellee submits that the proffered testimony is insufficient to warrant a remand to the lower court and is clearly insufficient to probably produce an acquittal in a new trial. *Thompson* v. *United States*, *supra;* compare *Saunders* v. *United States*, 91 U.S. App. D.C. 90, 197 F. 2d 685 (1952); *Wright* v. *United States*, 94 U.S. App. D.C. 307, 215 F. 2d 498 (1954). The jury had the best evidence possible to judge the effect of any drinking by appellant at the time of the crime—the Secret Service recording of the conversations. The jury could consider appellant's words, manner of speech and formulation of ideas. There were witnesses who described appellant's condition on the day of the offense and his reputation as an alcoholic. There was evidence presented toward the question of the effect of drinking upon the person of appellant. Sufficient evidence was presented on both sides of the question of the physical effect of alcohol upon appellant for the jury to make an intelligent decision.

The present case is distinguishable from *Campbell* v. *United States*, 126 U.S. App. D.C. 250, 377 F. 2d 135 (1966). In *Campbell*, the Court remanded because of "other factors in the case which first came to our notice during oral argument and were not presented to the District Court." The District Court had denied a motion for new trial based on the new testimony of certain alibi witnesses, who would have placed appellant far from the scene of the crime at the critical hour. This Court said that the District Court had been correct in denying the motion because the witnesses were known to appellant at the time of the trial but remanded for a hearing on the question of lack of diligence by trial counsel. It was at oral argument that this Court learned of the allegation that the failure to call the witnesses at the time of the trial was attributable to appellant's original trial counsel,

who had been aware of these alibi witnesses but had consciously failed to call them.

In the case at bar, the District Court considered the allegation of conscious failure by trial counsel to call certain witnesses. The District Court denied the motion for new trial and the motion for reconsideration, both of which contained the allegation of ineffective counsel. A hearing on remand would not produce any evidence which was not before the trial judge during his consideration of these motions. Clearly the trial judge did not abuse his discretion in denying these motions. Thus, the present case is distinguishable from *Campbell.*

In addition to *Campbell*, the appellant cites *Jackson* v. *United States*, 125 U.S. App. D.C. 307, 371 F. 2d 960 (1966), as "suggesting" that a new trial would be warranted. The facts in the case at bar are in no way similar to those that were presented to the Court in *Jackson.*

In *Jackson* the potential witness would have provided testimony which was vital to the defendant's case. Her testimony, if believed, would probably have led to an acquittal. She could have testified that the complaining witness had a gun in his possession. This testimony would have strongly supported the defendant's claim of self-defense. There had been *no other evidence* produced at trial indicating that the complaining witness had a gun in his possession. Obviously her testimony in this regard was not cumulative.

Unlike *Jackson*, where no other witness testified to the critical issue, in the case at bar, there were several defense witnesses who described appellant's condition on the day of the offense and testified as to his heavy drinking and alcoholism. There was sufficient evidence presented toward the question of the effects of drinking upon the person of appellant. In *Jackson*, this Court said that the facts sworn to in the affidavit were sufficient, if found to be true, to warrant a new trial. In the case at bar, the affidavits, taken to be true, are merely cumulative and would be insufficient to probably produce an acquittal in a new trial.

Appellant has not shown, in any way, a conscious failure by trial counsel to call additional witnesses. Appellant should not be allowed to employ counsel to put on half his case, and later claim a new trial on the grounds of ineffective assistance of counsel. If appellant is, in fact, raising the issue of ineffectiveness of counsel, he should pursue his remedy under 28 U.S.C. § 2255. See, *Jackson* v. *United States*, *supra*, (dissenting opinion). See also, *Moore* v. *United States*, 95 U.S. App. D.C. 92, 220 F. 2d 198 (1955).

## CONCLUSION

For the reasons set forth above, we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

DAVID G. BRESS,
*United States Attorney.*

FRANK Q. NEBEKER,
*Assistant United States Attorney.*

CHARLES E. BROOKHART,
*Attorney,*
*Department of Justice,*
*Washington, D. C. 20530.*
*Attorneys for Appellee.*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 315504 85